HIGH COURT OF CHHATTISGARH AT BILASPUR

First Appeal No.52 OF 2006

APPELLANTS Meva Devi and others
Defendants

Vs

Respondents Omprakash and others

AND

First Appeal No.55 OF 2006

APPELLANTS Baijnath Agrawal and others

Vs

Respondents Jagannath Prasad Agrawal and others

JUDGMENT

POST ON 3rd OCTOBER 2007

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

First Appeal No.52 OF 2006

APPELLANTS **Defendants**

1. Meva Devi, W/o Late Shri Ramkishan; aged 70 years
2. Banarasi Das, s/o late Shri Ramkishan; aged about 65 years
3. Smt. Asha Devi, W/o Late Shri Govindram; aged about 45 years
4. Ku. Sonal D/o Late Shri Govindram; aged about 16 years
5. Ku. Rachna, D/o Late Shri Govindram; aged about 15 years
6. Akash Kumar, S/o late Shri Govindram; aged about 11 years
7. Ku. Ayushi, D/o Late Shri Govindram; aged about 9 years

(Appellants No. 3 to 7 are the Legal Representatives of the deceased defendant late Shri Govindram, S/o Late Shri Ramkishan)

(In the impugned judgment and decree Govindram has been shown as defendant No. 4, however he had died during the pendency of the suit and his legal representatives have already been brought on record and therefore no need to mention the name of this deceased defendant)

(Appellants No. 4 to 7 are the minors and therefore they are being represented through their mother and natural Guardian Smt. Asha Devi, w/o. Late Shri Govindram.

8. Pawan Kumar, S/o Late Shri Ramkishan; aged about 45 years

All appellants are resident of Gandhi Ganj, Raigarh, Tehsil and District Raigarh (C.G.)

Vs

Respondents

1. Omprakash, S/o Late Shri Jagannath Agrawal, aged about 52 years
2. Ramesh Kumar, S/o Late Shri Jagannath Agrawal; aged about 49 years
3. Natwar Lal, S/o Late Shri Jagannath Agrawal; aged about 43 years
4. Pramod Kumar S/o Late Shri Jagannath Agrawal, aged about 41 years

5. Smt. Sharda Devi, W/o Pawan Kumar Kediya, aged about 47 years
6. Smt. Kiran Kediya, W/o Pawan Kumar Kediya, aged about 45 years

(In the impugned judgment and decree, the name of Jagannath Agrawal and Smt. Pushpa Devi, W/o Jagannath Agrawal has been shown as plaintiff. However, during the pendency of the suit, both Jagannath Agrawal and Smt. Pushpa Devi had expired hence they are not being impleaded as respondent. Their legal representatives have already been brought on record and they are respondents 1 to 6)
Plaintiffs
All residents of Gandhiganj, Raigarh, Tehsil and Distt. Raigarh (C.G.)

7. Baijnath Agrawal, s/o Late Jaynarayan Agrawal, aged about 75 years, R/o Gandhi Ganj, Raigarh, Tehsil and District Raigarh (C.G.)
8. State of Chhattisgarh through the Collector, Raigarh, District Raigarh (CG)

FIRST APPEAL NO. 55/2006

APPELLANTS

1. Baijnath Agrawal, S/o late Jainarayan Agrawal, age 55 years, r/o Gandhiganj, Raigarh, Tehsil and Distt. Raigarh, Chhattisgarh
Defendant No. 1

i. Smt. Savitri Devi, widow of Late Baijnath Agrawal, aged about 70 years
ii. Santosh Agrawal, son of Late Baijnath Agrawal, aged about 52 years
iii. Mohan Lal Agrawal, son of Late Baijnath Agrawal, aged about 45 years
iv. Pankaj Agrawal, s/o Late Baijnath Agrawal, aged about 28 years
The above mentioned heirs are resident of M.G. Road Raigarh, Distt. Raigarh C.G.
v. Smt. Lata Agrawal, d/o Late Baijnath Agrawal, wife of Shri Shyam Lal Agrawa, aged about 42 years, R/o New Khurshipar, Bhilai C.G.
vi. Smt. Madhu Agrawal, d/o Late Baijnath Agrawal, wife of Shri

Sanjay Agrawal, aged about 38 years, r/o 106 Sunder Nagar, Bhilai, C.G.

vii. Smt. Sarita Agrawal, d/o Late Baijnath Agrawal, wife of Shri Mukesh Agrawal, aged about 34 years, R/o New Khurshipar, Bhilai C.G.

viii. Ku. Uma Agrawal, d/o Late Baijnath Agrawal, aged about 29 years, R/o M.G. Road Raigarh C.G.

Vs

RESPONDENTS

1. Jagannath Prasad Agrawal, son of Late Jainarayan Agrawal, through the Legal representatives

1.A Smt. Pushpa Devi, widow of Jagannath Agrawal, aged about 71 years (dead deleted)

B. Omprakash, S/o Late Jagannath Agrawal, aged about 52 years

C. Ramesh Kumar, S/o Late Jagannath Agrawal, aged about 49 years

D. Natwarlal, S/o Late Jagannath Agrawal, aged about 43 years

E. Pramod Kumar, S/o late Jagannath Agrawal, aged about 41 years

F. Smt. Sharda Devi, W/o Pawan Kumar Kedia, aged 47 years

G. Smt. Kiran Kedia, W/o Pawan Kumar Kedia, aged about 45 years

Plaintiffs

All residents of Gandhiganj, Raigarh, Tehsil and Distt. Raigarh, C.G.

2. Mewa Devi, Widow of Ramkishan aged about 65 years-**Defendant No. 2**

3. Banarsidas, son of Late Ramkishan, aged about 40 years-**Defendant No. 3**

4. Govind Ram, son of Late Ramkishan, aged about 38 years, (dead deleted), through: Legal Representatives- Defendant No. 4

A. Smt. Asha Devi, w/o. late Govindram, aged about 43 years

B. Ku. Sona, D/o Late Govindram, aged about 15 years

C. Ku. Rachna, D/o late Govindram, aged about 15 years

D. Akash Kumar, S/o late Govindram, aged 11 years

E. Ku. Ayushi, D/o Late Govindram

aged 9 years
Minors through their natural Guardian mother Smt. Asha Devi, All resident of Gandhiganj, Raigarh, Tehsil and Distt. Raigarh, C.G.

5. Pawan Kumar, s/o Late Ramkishan aged 35 years- Defendant No. 5
Respondent No. 2 to 5 are residents of Gandhiganj, Raigarh, Tehsil and District Raigarh, C.G.

6. State of Madhya Pradesh (Now State of Chhattisgawrh), through: Collector, Raigarh.

Present: Shri P. Diwakar, Sr. Advocate with Shri P.R. Patankar, Advocate for the appellants
Shri Ravish Agrawal, Sr. Advocate with Shri Sanjay S. Agrawal, Advocate for the respondents No. 1 to 7.
Shri Arun Sao, Govt. Advocate for the respondent No. 7.

Shri Shree Kumar Agrawal, Sr. Advocate with Shri Anand Kumar Gupta, Advocate for the appellants.
Shri Ravish Agrawal, Sr. Advocate with Shri Sanjay S. Agrawal for the respondent No. 1 to 5.
Shri Arun Sao, Govt. Advocate for respondent No. 6.

J U D G M E N T
(Delivered on 03/10/2007)

Dhirendra Mishra, J

1) First Appeal No. 52/2006 preferred by the original defendants No. 2, 3 and legal representatives of defendant No. 4 and First Appeal No. 55/2006 preferred by the defendant No. 1 are being disposed of by this common judgment as both the appeals are arising out of the judgment and decree dated 25th February, 2006 passed in F.A. No. 50A/84 whereby learned First Additional District Judge, Raigarh has decreed the suit filed by the Original Plaintiff Jagannath Agrawal for recovery of possession of the suit house and decree of declaration of the title of

the plaintiff over the agricultural lands described in Schedule 5 of the plaint.

2) Plaintiff Jagannath Agrawal and defendant No. 4 Govind Ram died during pendency of the suit whereas defendant No. 1 died during pendency of the appeal.

(Parties hereinafter shall be referred to as per their description before the trial Court.)

3) Relationship between the parties in the suit is not in dispute. Plaintiff Jagannath, defendant Baijnath and late Ramkishan, husband of defendant No. 2 and father of defendants No. 3 and 4 were sons of Jainarayan Agrawal. Ramkishan died in the year 1967.

4) The case of the plaintiff in brief is that the House No. 46, Raigarh situated in front of Police Kotwali, Gandhi Ganj Ward 15 and other Pakka houses in all 8 in number and 2 Kachcha houses were acquired property of late Jainarayan and 30 acres of land, cash, gold ornaments etc acquired by Jainarayan Agrawal was property of the joint family. During lifetime of late Jainarayan Agrawal, Ramkishan Das and Baijnath expressed their desire of doing independent business after separating from the family due to domestic quarrels in the family and, therefore, late Jainarayan on Kartik Badi 13, Samvat 2005 (year 1949) with the consent of his three sons, affected oral partition of all the movable and immovable properties and separated Ramkishan Das and Baijnath from the joint family after giving them their share, however, the younger son Jagannath Agrawal remained joint with the father. Since then, the defendant No. 1 and Ramkishan Das are independently in the possession of their respective shares. A memorandum of partition was recorded on Asarh Sudi 2 Samvat 2006 and the same was signed by late Jainarayan and witnesses Hariprasad

Agrawal, Laxminarayan Agrawal, Birkhman Agrawal and Gopiram, however Hariprasad Agrawal and Laxminarayan Agrawal have died. Late Ramkishan Das and defendant Baijnath also gave acknowledgement of receiving their shares. Since the plaintiff was young boy at the time of oral partition, he continued to live jointly with his father. In the said partition, apart from cash and jewelry and other house hold utilities, Ramkishan Das was given three Pakka Houses in the city of Raigarh whereas defendant Baijnath was given one Pakka house of Sadar Bazar and two Pakka houses situated over Khasra No. 1460 and 1462. In the said partition, Jainarayan kept the remaining two Pakka Houses, two Kachcha houses and 30 acres of agricultural land situated in village Beladula for himself and his son Jagannath. Apart from this, the responsibility towards loss and profit of Firm Pannalal Jainarayan fell in the share of late Jainarayan and the plaintiff. Since the house allotted in the share of Baijnath was not fit for residential purposes, Baijnath was allowed to live in the house No. 46 situated in Ward No. 15, Gandhiganj, Raigarh (the suit house) purely as a licencee. In the meanwhile, mother of the plaintiff died in the year 1959 and father Jainarayan died on 14th January, 1961 and after their death, the plaintiff became absolute owner of the joint property of Jainarayan and Jagannath. After the death of the father, plaintiff went to Kolkata and Siligudi in the year 1963-64 for doing business. The records pertaining to the house were mutated in the share of respective share holders in the year 1949 itself without any objection of the defendants or late Ramkishan Das. In April, 1983, the plaintiff returned to Raigarh and started residing in the suit house and requested the defendants to vacate the house and on refusal, the suit for vacant possession, damages was filed, subsequently the suit was amended by the

plaintiff on 19-4-1989 and by this amendment, it was pleaded that after the oral partition, the plaintiff was in possession of the agricultural land admeasuring 30 acres described in Schedule 2, however he sold some part of the land between 1969 to 1972 and the plaintiff is in possession over the remaining agricultural land of 17 acres 85 decimals described in Schedule 5 and a declaration was sought that he is the owner of the land situated at village Beladula described in Schedule 5 of the plaint.

5) The defendant No. 1 in his written statement denied that the properties described in the plaint were the acquired properties of Jainarayan and they stated that it was a property earned by joint family. The partition was also denied. Partition in the year 1949 as alleged in the plaint was denied and pleaded that Ramkishan Das and Baijnath were not allotted any share and it was further pleaded that Jainarayan and his sons continued to be joint and all the members of the joint family enjoyed the joint property together. Oral partition, execution of memorandum of partition and acknowledgement of share by Ramkishan Das or defendant was denied. It was pleaded that Firm Pannalal Jainarayan continued to be the firm of joint family and the suit house is the property of the joint family and it is jointly possessed by them. The pleading that the plaintiff became absolute owner after death of Jainarayan in the year 1961 has been denied and it has been pleaded that after the death of father, all the properties of the joint family has been inherited by coparceners on the basis of survivorship. The plaintiff has obtained the lease of the suit land secretly and the defendants after knowing about the same have raised objection before the authorities. The ownership over the agricultural land of the plaintiff on the basis of oral partition has also been

denied. It has been stated that the plaintiff has sold his 1/3rd share of the agricultural land with the permission of the defendants and therefore, the plaintiff does not have any right over the remaining land and the defendants are in possession of the remaining agricultural land since beginning.

6) The defendants No. 2 to 5 have also taken identical stand in their written statement.

7) On the basis of the pleading of the respective parties, issues were framed. The plaintiff examined himself as P.W.1, Manoj Kumar Mishra as P.W. 2, Hariprasad Nayak as P.W. 3, N.R. Ratre as P.W. 4 and A.K. Pratap as P.W. 5 whereas the defendant examined Baijnath as D.W. 1, Shyam Sunder Agrawal as D.W. 2, Bhaggu Bhai Gandhi as D.W. 3 and Santosh Kumar as D.W. 4.

8) Learned Additional District Judge decreed the suit by recording a finding that the defendants are in possession of 1/3rd portion of the complete suit house, proper court fee has been paid by the plaintiff partition of the properties belonging to undivided Hindu family took place in the year 1949 between the parties and in the said partition, the suit property fell in the share of the plaintiff and his father and the defendants are residing in the suit house as licencee with the permission of the plaintiff and his father and the licence has been revoked by the plaintiff and the plaintiff is entitled to recover the vacant possession of the suit house and the defendant shall deliver possession of the suit land described in Schedule I with the red ink within a period of two months. It has been further held that the land described in Schedule 2 fell in the share of the plaintiff and the plaintiff is in possession over the land described in Schedule 5 continuously since 1964 till date and the plaintiff's suit is within the limitation and accordingly a decree of declaration of

title over the agricultural land described in Schedule 5 that the defendants have no right over the same has been passed and the suit has been decreed with cost.

9) The grounds urged by the learned counsel for the appellants in support of their appeal may be summarized as under:-

A. The plaintiff's claims, the property to be self-acquired property of Jainarayan who affected oral partition and allotted shares to his sons Baijnath and Ramkishan Das. However the partition of any property can be affected only among the parties who have pre-existing right to the property and the same could not be orally partitioned between the sons by Jainarayan himself as his sons did not have any pre-existing right to the property during the life time of Jainarayan. Reliance is placed on **Hiraji Tolaji Bagwan –v- Shakuntala**[1].

B. The case of the plaintiff is that Jainarayan affected oral partition on Kartik Badi 13 Samvat 2005 (year 1949) with the consent of his sons and separated his sons Ramkishan Das and Baijnath from the joint family after giving their shares and he along with his younger son Jagannath continued to be joint and memorandum of this oral partition was recorded on Asarh Sudi 2 Samvat 2006, however it has also been pleaded that on the basis of the above memorandum, Ramkishan and Baijnath acknowledged the receipt of their share and gave the same to Jainarayan, however the memorandum of partition and alleged acknowledgment given by Ramkishan and Baijnath has not been adduced in evidence and proved. The application under Section 65 of the Indian Evidence Act for permission to lead secondary evidence of memorandum of partition was allowed by the trial Court however, the defendants moved a civil revision No.

[1] AIR 1990 SC 619

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477/89 against the order dated 15-9-89 of the Trial Court which was allowed by the High Court of Madhya Pradesh vide order dated 1-10-1993 with an observation that there was no basis to arrive at a satisfaction that the original is destroyed or lost. The plaintiff's S.L.P. against the above order was also dismissed by the Apex Court. Referring to Section 91 of the Indian Evidence Act, it is argued that the case of the plaintiff is based on memorandum of oral partition and acknowledgement of partition executed by the defendant on the basis of memorandum of above partition, therefore, the best evidence of contents of the document is the document itself which could be proved by primary evidence by production of the original document. Section 91 of the Evidence Act excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led. Since the plaintiff has not produced the original document being the memorandum of partition or acknowledgement of partition, oral evidence adduced by the plaintiff to prove the contents of the document should have been excluded. Reliance is placed on **Hiralal and others –v- Badkulal and others**[2] and **Bai Hira Devi and others –v- Official Assignee of Bombay**[3].

C. It was further argued that the plaintiffs have withheld the best evidence i.e. the alleged memorandum of partition and acknowledgement of the partition given by the defendants which would have thrown light on the issue in controversy. In these circumstances, the trial Court ought to have drawn adverse inference against the plaintiffs under Section 114 of the Indian Evidence Act. Reliance is placed on **Gopal Krishnaji Ketkar –v- Mohamed Haji Latif and others**[4].

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[2] AIR 1953 SC 225
[3] AIR 1958 SC 448

[4] AIR 1968 SC 1413.

D. Referring to document of Ex. D-3, it has been argued that the plaintiff has taken different stand before the Tehsildar in the application for mutation wherein he has claimed that according to oral partition, the land at Beladula was allotted in his share by his father whereas in the civil suit he claims that he continued to be joint with his father. Similarly in the document of Ex. D-5, the plaintiff has objected to the transfer of the house by his brothers claiming that he also has a share in the said property though in the plaint it has been mentioned that the property in question fell in the share of his brothers whereas document of Ex. P-13 is the receipt of the tax of the suit house issued by the Municipality which shows that the house is recorded in the name of Firm Jainarayan Pannalal. The Tehsildar vide order Ex. P-21 has rejected the application for mutation preferred by the plaintiff on the basis of the memorandum of partition and directed the parties to get their title adjudicated in Civil Court.

E. Extensively referring to the statement of Hari Prasad Nayak (P.W. 3), it has been argued that the plaintiffs have examined this witness as the witness of oral partition as he claims that Jainarayan and his family were his clients. However, he is the witness of only oral partition and he expresses his ignorance about execution of memorandum after oral partition. On the contrary, he has submitted that had the oral partition been reduced into writing, he would have definitely known about the same. The version of this witness is contrary to the case of the plaintiffs who have claimed that memorandum of oral partition was subsequently recorded, therefore, the evidence that the oral partition was affected in his presence is not worth reliance. This witness was also not cited by the plaintiff in the list of witnesses submitted by him.

F. Referring to para 26 of statement of P.W. 1 Jagannath Agrawal, the plaintiff, it has been argued

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that he is not a witness of partition and he does not know anything about the partition as the same was affected by his father. This witness has admitted that he had preferred objection vide Ex. D-5 against the sale by the defendants of the house of their shares. Except these two witnessed, there is no oral evidence adduced by the plaintiff in support of the oral partition.

G. The Court below ignoring the above documentary evidence and inconsistency in the oral evidence of the plaintiff has acted upon their testimony and decreed the suit. The plaintiff has failed to prove his case by leading credible documentary evidence and the court below ought to have dismissed the suit.

10) Relying upon the judgment in the matter of **Commissioner of Wealth Tax, Kanpur etc. –v- Chander Sen etc.**[5], it is argued that under the Hindu Law the son would inherit the property of his father as karta of his own family. But the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of a Class I then upon the heirs mentioned in Class I of the Schedule.

11) Referring to the judgment of **Bipin Shantilal Panchal –v- State of Gujarat and anr.**[6], it is argued that the trial court has not decided several objections reserved by it with respect to the admissibility of the documents during evidence which were necessary before delivery of the judgment.

12) Sum and substance of the arguments advanced by the counsel for the respondents may be summarized as under:-

[5] AIR 1986 SC 1753
[6] (2001) 3 SCC 1

A. With respect to the contention of the oral partition that late Jainarayan could not have affected partition of the suit property since it was his self-acquired property and his sons did not have any pre-existing right to the said property, referring to paragraph 2 of the plaint, it has been argued that though the property has been shown to be acquired by late Jainarayan, however, the property has been mentioned in the same paragraph as property belonging to the joint family. The defendants have also not disputed in their written statement that the property in question was the property of the joint family, thus it is neither the case of the plaintiff nor of the defendants that the property was exclusive property of late Jainarayan and acquired by himself and it was not the property of joint family.

B. Referring to para 322 of Chapter 16 of 19th Edition of Mulla Hindu Law it was contended that the father can affect partition during his lifetime of the family property exercising his right *"patria potestas"* i.e. "superior power" or "peculiar power".

C. The oral partition was affected in the month of Kartik Badi 13 Samvat 2005 as per pleading of the plaintiff and Ramkishan and defendant Baijnath were separated from the joint family after they were given their due shares and thus oral partition had already taken effect in Kartik Badi 13 Samvat 2005. It is argued that no document is necessary to effect partition amongst joint owners and the partition may be affected orally and subsequently the document may be made for recording the fact of such partition and in the event, the document is inadmissible, partition can be proved by oral evidence. The case would be different where the partition is claimed to be affected on the basis of document and the document is inadmissible for any reason, in these circumstances alone, no oral evidence can be given in view of Section 91 of the Evidence Act.

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Reliance is placed on **Somalisingh –v- Lakhalal**[7], **Ramrattan –v- Parmanand**[8], **Gerua Biswal –v- Kshyama Biswal**[9], **Kanamathareddi Kanna Reddy –v- Kanamatha Reddy Venkata Reddy**[10], **Juhari Sah and others –v- Dwarika Prasad Jhunjhunwala and others**[11], **Smt. Krishna Bai and others –v- Shivnath Singh and others**[12].

D. Referring to para 20, 21 and 22 of the impugned judgment, it was argued that the findings are based on duly proved public documents which establishes the version of the plaintiff and his witnesses that the property in question was orally partitioned in the year 1949 and accordingly revenue records being maintenance Khasra were mutated pertaining to the suit house. Document of the year 1956 being permission accorded to the plaintiff for repair of the suit house has also been filed. The names of the defendants were also mutated in the revenue record pertaining to the houses allotted to them in the oral partition. The lease of the suit house was renewed in the year 1964-65 for a period upto 1983 in the name of the plaintiff. The parties had from time to time affected transfers of the land and houses belonging to their share has also been considered as evidence of partition and the trial Court has accepted the case of the plaintiff of oral partition and disbelieved the version of the defendants that no partition was affected and the properties continued to be joint family property. This finding is based on the ground that the defendants have deliberately suppressed the fact of partition and have not explained as to under what circumstances, the properties were recorded separately in the name of brothers and how they transferred the property without consent of the others.

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[7] 1965 MPLJ Note 64
[8] AIR (33) 1946 Privy Council 51
[9] AIR 1962 ORISSA 107
[10] AIR 1965 AP 274 (FULL BENCH)
[11] AIR 1967 SC 109
[12] AIR 1993 MP 65

E. Extensively referring to the deposition of Baijnath (D.W. 1), learned counsel for the respondent has argued that this witness has admitted in his deposition that his father Jainarayan had got recorded his name in some houses and the name of his elder brother in some houses even before 1951 -52 and he had also given all the houses situated behind Ganj to Banarasi Das and accordingly his name was mutated in the said houses and the trial Court after considering the oral and documentary evidence available on record and admission of Baijnath has decreed the suit and the same is based on proper appreciation of evidence available on record.

F. That with respect to the ground taken in para 18 of the memorandum of appeal that even if it is held that the partition was affected by his father and the plaintiff remained joint with him, in that case also, the share of the father after his demise is to be partitioned amongst his sons including the defendants and the plaintiff, it has been argued that explanation (2) of Section 6 of the Hindu Succession Act, 1956, as it existed before the amendment Act, 2005, stipulates that the defendants who were separated from the coparcenary before the death of Jainarayan cannot claim share in the interest referred to in the proviso to Section 6. Reliance is placed on **Ganta Appalanaidu –v- Ganta Narayanamma and others**[13], **M.V. Shivaji Rao Kore and others –v- Rukminiyamma and others**[14], **Satyanarain Mahto and another –v- Rameshwar Mahto and others**[15] and **Basavalingamma –v- Sharadamma**[16].

13) I have heard learned counsel for the parties, perused the impugned judgment as also the evidence and documents available on record.

[13] AIR 1972 AP 258
[14] AIR 1973 MYSORE 113
[15] AIR 1982 PATNA 44
[16] AIR 1984 KARNATAKA 27

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14) Before adverting to the facts of the case, I propose to examine the questions of law raised by the appellant during arguments.

15) On the basis of the pleadings in the plaint, the appellants submitted that the case of the plaintiff was that the disputed property is self-acquired property of late Jainarayan and he affected partition amongst his sons during his lifetime in the year 1959. Relying upon **Heeraji Tolaji Bagwan -v- Shakuntala**[1] it has been argued that the partition of the property can only be amongst the parties who have a pre-existing right to the property and therefore, late Jainarayan could not have affected partition in the light of the case of the plaintiff that the property was his self-acquired property and therefore, there was no pre-existing right to his sons before the death of late Jainarayan. However, from perusal of paragraph 2 of the plaint, the plaintiff has pleaded that Jainarayan who was father of the parties acquired the properties described in this paragraph which were properties of the joint family. The defendants in their written statement have also claimed that the properties were joint properties. There was no issue before the trial Court regarding the nature of the property whether the property was joint property of deceased Jainarayan and thus there was no confusion regarding the nature of the property and the suit has been decided by considering the property to be joint family property.

16) Learned counsel for the appellants has stressed upon the fact that the suit of the plaintiff was based on oral partition, memorandum of which was subsequently recorded before the witnesses, the sons Ram Kishan and Baijnath acknowledged the receipt of their shares, however the documents have not been produced by the plaintiff. In view of Sections 91 and 92 of the Evidence Act, no oral evidence could be

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given in proof of the terms of such contract, grant or other disposition of the property, except the document itself, or secondary evidence of its contents where secondary evidence is admissible.

17) Section 91 of the Evidence Act is reproduced hereinbelow:-

> "91. **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.**- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> *Exception 1.*- xxx xxx xxx
>
> *Exception 2.*- xxx xxx xxx
>
> *Explanation 1.*- This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than once.
>
> *Explanation 2.*- Where there are more originals than one, one original only need be proved.
>
> *Explanation 3.*- The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not

preclude the admission of oral evidence as to the same fact."

18) In Law of Evidence by Sarkar (Fifteenth Edition) while considering the principles and scope of Section 91, it is mentioned that Oral evidence is excluded equally when a document does exist and when the law requires the matter to be reduced to the form of a document. But where a document in writing is not a fact in issue and is merely used as evidence to prove some fact, oral evidence *aliunde* is admissible. Thus payment of money may be proved by oral evidence although a receipt was granted. When a document is meant merely as a collateral or informal memorandum of a transaction and not as a document embodying the three kinds of fact, [terms (i) of a contract, or (ii) of a grant, or (iii) of any other disposition of property] oral evidence is not excluded. This has been made clear by Explanation 3.

19) In the matter of **Bai Heera Devi -v- Official Assignee, Bombay**[3], it has been held that Section 91 is based on the best evidence rule. The best evidence about the contents of a document is the document itself and it is the production of the document that is required by S. 91 in proof of its contents. In a sense, the rule enunciated by S. 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the evidence Act.

20) According to Para 322 of Principles of Hindu Law by Mulla (19th Edition), the father of a joint family has the power to divide the family property at any moment during his lifetime, provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the

father from the sons, but a separation of the sons interse. The consent of the sons is not necessary for the exercise of that power. This right of a father at times described as his 'superior power' or 'peculiar power' or 'patria potestas'. Referring to the judgment of the Supreme Court in ***Apporva Shantilal -v- IT Commissioner, Gujarat***[17] it is mentioned that a father was entitled to effect a partial partition of joint family properties by virtuies of his right as patria potestas.

21) In **Ram Rattan -v- Parma Nand**[8] Their Lordships relying upon the oral evidence available on record regarding partition, which was subsequently reduced into writing, it was held that the oral evidence proved partition in February, 1939, even disregarding the documents 'C' and 'D' which were not stamped.

22) In **Gerua Biswal -v- Kshyama Biswal**[9] also, Division Bench of Orissa High Court has held that in Mitakshara Joint Hindu family no document is necessary to effect partition for the division of the property amongst the joint owners. The division may be made orally and a subsequent document might be made recording the fact of such division. In such a case, even if the document of partition is hit for non-registration, independent oral evidence may be given of the actual division.

23) In **Kanamathareddi Kanna Reddy -v- Kanamatha Reddy Venkata Reddy**[10] in para 6, 8, 9 and 10 of the judgment, it is held that non-registration of a document which is required to be registered under Sec. 17(b) of the Registration Act, 1908 will not avail to create, declare, assign, limit or extinguish any right, title or interest in or to the immovable property comprised in the document. In short, the document will be ineffectual to achieve the

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purpose for which it was brought into being. The effect of Sec. 49(a) does not go further than this. The circumstance that the earlier partition was evidenced by an unregistered partition deed will not render proof of the factum of that partition by other evidence inadmissible under Sec. 91 of Evidence Act, because this section excludes oral evidence only in proof of the terms and not of the existence as a fact of a contract, grant or other disposition of property.

24) In the matter of **Somalisingh –v- Lakhalal**[7], learned Single Judge of M.P. High Court has held that no document is necessary to effect partition amongst joint owners. It is permissible to effect a partition orally and subsequently a document may be made recording the fact of such partition.

25) In the matter of **Smt. Krishna Bai and others – v- Shivnath Singh and others**[12] the Supreme Court in para 7 has held that an unregistered partition list is inadmissible in evidence, however, oral evidence to prove separation in status of the parties and an agreement between them to enjoy the joint family property in separation can be proved and is not hit by any bar contained in Section 91 of the Evidence Act.

26) In the light of the principles of law laid down in the above judgments, it is manifestly clear that partition of a joint family property can be affected by father/Karta in his lifetime amongst his sons even without obtaining their consent. The only requirement of law is that the partition should be just and equitable. Partition of joint family property can be affected orally, memorandum of partition can be recorded of oral partition affected in past. Subsequent memorandum of partition recorded in the past if not received in evidence for any reasons including for non-registration, the partition can be established by adducing oral evidence.

27) Coming to the next legal submission of the appellant that even if the partition as pleaded by the plaintiff is accepted, after the death of late Jainarayan, the share of the Jainarayan would devolve as per Section 8 of the Hindu Succession Act amongst all the heirs of Jainarayan.

28) Prior to Hindu Succession Amendment Act, 2005, Section 6 read as under:-

> "6. **Devolution of interest in coparcenary property.**- When a male Hindu dies after the commencement of this Act having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.
>
> Provided that, if the deceased had left surviving him a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in Mitakshra coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> *Explanation 1*- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
>
> *Explanation 2*- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself

from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

29) In the matter **Commissioner of Wealth Tax**[5], the question was whether the income or asset which a son inherits from his deceased father (separated by partition), should be assessed as income of the Hindu undivided family of son or his individual income ? According to Hindu Law, the son would inherit the property of his father as karta of his own family. But the question was as to what was the effect of Section 8 of the Hindu Succession Act ? Discussing the divergent views expressed by Allahabad High Court, Madras High Court, M.P. High Court and A.P. High Court, according to which a son inherits from his father when separated by partition, the same is inherited by him as an individual income and the opinion of Gujarat High Court, in such circumstances, the son inherits the property as Karta of his own joint family, it has been held that the views expressed by Allahabad High Court, Madras High Court, M.P. High Court and A.P. High Court to be correct and they did not agree with the views of Gujarat High Court. The fact in this case was that there was a partition of joint family business between father and his only son, however they continued the business in the name of partnership firm. The son formed a joint family with his own son. The father died intestate and the amount outstanding to the credit of deceased father in the account of the firm devolved on his son. The Wealth tax authorities while assessing the wealth tax in respect of the family of the son i.e. the assessee, included the amount in computing wealth and in the circumstances, it was held that the son inherited the property as an individual and not as Karta of his own family, therefore, it could not be included in

computing the assessee's wealth. Referring to Section 8, of the Hindu Succession Act, it was held that where a male died intestate, his property devolves according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class I of the Schedule and class I of the schedule does not include son's son, therefore, it has been held that the after death of the father, his self-acquired property devolves upon his son in his individual capacity.

30) In the matter of **Ganta Appalanaidu –v- Ganta narayanamma and other**[13] in paragraph 5, while dealing with the explanation 2 to Section 6 of Hindu Succession Act, it has been held that Section 8 applies to all cases of intestacy of a male Hindu except those to which Section 6 applies. The devolution has been explained with the help of an illustration thus 'An example will make the position clear. Suppose A dies leaving a divided son B, an undivided son C and a widow D. At the time of his death A and C alone are members of a coparcenary. On A's death his half share in the coparcenary property shall not go by survivorship to C since there is a female relative specified in Class I. It shall devolve by intestate succession. The two sons and the widow will be heirs but Explanation 2 excludes the divided son B. The result therefore, is that the half share of A in the coparcenary property shall devolve by intestate succession on C, his undivided son and D, his widow. That is all the effect of the explanation. Where property which ought to devolve by survivorship on an undivided coparcener under the main provision of Section 6 devolves on the heirs as if on intestacy because of the existence of the female relative etc., mentioned in the proviso to Section 6, the explanation provides that the divided coparcener, nonetheless, shall not claim as an heir.

The explanation does not however prevent a divided son from claiming succession on intestacy if there is no person on whom the property can devolve by survivorship in accordance with the provisions of Section 6. Section 8 applies to every case of a Hindu dying intestate leaving no one on whom the property can devolve by survivorship.

31) In **M.V. Shivaji Rao Kore and others –v- Rukminiyamma and others**[14], it has been held that the explanation 2 of Section 6 only reproduces the law which was already in force before the Act came into force. A son who is divided from a family was not entitled to claim a share in the property of the father on his death if there were son or sons living with him at the time of his death. Explanation II does no more than incorporating the same principle of law in the Act. It states that the proviso to Section 6 would not enable a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the estate of the deceased. Proviso to Section 6 is an exception to the rule incorporated in the main part of Section 6 and Explanation 2 is an exception to the rule incorporated in the proviso to Section 6. While construing a provision of the type we have to construe it strictly and if the case of any person cannot be brought within the four corners of the exception it should be held that it would not affect the interest of such a person.

32) In **Satyanarayan Mahto and another –v- Rameshwar Mahto and others**[15], in para 5 it has been held that :-

> "We explain this point by giving an illustration. There was a separation between A, the father, and his two sons- B and C. B completely separated from his father. After partition, C remained joint

with A. After the death of A, C will inherit the property by virtue of Expln. 2. B cannot lay any claim for partition in respect of the property left by A after his death. We give another example. There was a separation among A, B and C. A was the father and B and C were his sons. All the three were living separately. A died leaving behind his widow and two sons B and C. B and C along with the widow will be entitled to equal share in view of S. 8 of the Act"

33) In **Basavalingamma and others -v- Sharadamma**[16], principle of law laid down regarding devolution of interest of Hindu intestate male in view of explanation II of Section has been reiterated in para 11 to 15.

34) Thus in view of the principles of law laid down in the aforesaid judgments and also considering the fact that the question before the Hon'ble Supreme Court in the matter of **Commissioner of Wealth Tax**[5] was entirely different and in judgment, the affect of explanation 2 of Section was not an issue as it dealt with the devolution of the interest of the intestate Hindu male after his death upon his son viz a viz. his son's own joint Hindu family with his sons as Karta of the family. The property of male Hindu being intestate in a Mitakshra coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and a person who has separated himself from coparcenary before the death of the deceased or any of his heirs, cannot claim a share in the intestate of the deceased.

35) Apart from above legal submissions, the appellant has also contended that the plaintiff has not pleaded material facts regarding oral partition as description of the property, allotment of specific

shares, the presence of persons before whom the partition took place etc. have not been pleaded. Though the contents of memorandum of partition have been pleaded in the plaint but the same was not proved by adducing the document in evidence. Therefore, pleading based on memorandum of partition could not be taken into consideration for the purpose of deciding the issue of factum of partition. The Court below ought to have drawn adverse inference against the plaintiff for not producing the memorandum of partition. Reliance is placed in the matter of **Hiralal and others –v- Badkulal and others**[2] and **Gopal Krishanji Ketkar – v- Mohamed Haji Latif and others**[4].

36) So far as the contention of the appellants that the plaint lacks pleading in material particulars of partition is concerned, from perusal of para 2, 3 and 5, it is evident that the details of the property of the joint family have been pleaded in paragraph 2. The pleading regarding oral partition has been pleaded in detail in paragraphs 3 and 5 describing the shares allotted to Ram Kishan, Baijnath and the share of late Jainarayan and the plaintiff together. The defendants in their written statement have not disputed the description of the properties of the joint family however they have denied the oral partition and subsequently recorded memorandum of partition. There is no pleading in the written statement that the description to different share holders is vague and not specific. So far as not adducing the memorandum of oral partition in evidence, the plaintiff tendered the secondary evidence of memorandum of oral partition on the ground that the original was lost, however the same was not accepted in evidence on the objection of the defendants. It has already been held by this Court in foregoing paragraphs that the plaintiff proved the factum of partition by adducing oral evidence

however subsequent memorandum of partition reduced in writing to evidence oral partition affected in the past could not be tendered for some reason.

37) In the matters of **Heeralal and others**[2] and **Gopal Krishnaji Ketkar**[4] it has been held that even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could through light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

38) However, in the instant case, the onus of proving partition is upon the plaintiff. He tendered memorandum of partition recorded after six months of oral partition in evidence. However, the secondary evidence of the same was not permitted to be adduced in evidence. The above document if adduced would have been additional evidence to buttress the claim of the plaintiff of oral partition, however, in the absence of above document if the plaintiff is able to prove the factum of partition by leading oral evidence and other documentary evidence, the same shall not affect the case of the plaintiff and the question of drawing adverse inference against the plaintiff does not arise.

39) The trial Court on the basis of the pleading of the respective parties, oral evidence of plaintiff Jagannath Agrawal and Hari Prasad Naik (P.W. 3) has held that the version of the plaintiff and his witnesses is established from the documents of maintenance Khasra of Ex. P-2 to Ex. P-10. The other public documents filed and proved by the plaintiff are Nazul rent receipt of the suit house Ex. P-11, permission to construct house Ex. P-12,

application for renewal of lease Ex. P-14, renewal of lease deed Ex. P-36, P-37 and P-38 in the name of the plaintiff, rent receipt of Ex. P-44 and P-45 deposited by Baijnath on behalf of Jagannath of the suit house, copy of revenue order sheet of Ex. P-49 wherein Baijnath admits that the land in question was given in partition to Jagannath. Apart from the above documents, the trial Court has also considered various sale deeds Ex. P-52 and P-55 executed by the parties transferring the property which fell in their share and on the basis of this fact, the trial Court has observed that the defendant Baijnath had himself executed sale deed of a pakka house vide Ex. P-55 and they have deliberately tried to suppress the fact. The inference of partition has also been drawn on the basis of admission of the defendant Baijnath who has admitted in his cross-examination that his father had got his name and his elder brothers' names recorded in revenue papers with respect to some houses, even before 1951-52 and he has also specifically admitted that all the house situated over Khasra No. 1961, 1962 and 1936 were given to Banarasi Das by his father and two houses before police station and behind Gandhiganj were recorded in his name.

40) The documents adduced in evidence by the defendant have been duly considered and it has been held that even the document adduced by the defendant establishes the case of the plaintiff that there was a partition in the family. After appreciating the evidence in detail, it has been held that late Jainarayan had separated his sons Ram Kishan and Baijnath from joint family in the year 1949 giving them their due shares and he and Jagannath continued to be joint. The defendants have suppressed the fact of partition in their written statement though they have not been able to explain the documents adduced by the plaintiff in the

evidence to establish the factum of partition. On the contrary Baijnath has himself admitted the partition in his cross-examination and thus on the basis of oral and documentary evidence, the Court below has reached to the conclusion on the basis of preponderance of probability that oral partition was effected as pleaded by plaintiff and the suit houses situated in Gandhiganj fell in the share of Jagannath and his father.

41) With respect to the agricultural land situated at Beladula, the plaintiff has pleaded that after the partition, the above land fell in their share and since then they were in possession. He had sold some part of the land on 29-7-1972 through registered sale deed to Ramlal Agrawal and on 28-7-1972 to Harish Chandra Agrawal as described in Schedule 3 and 4 and the land stands mutated in their names and they are in possession of the land. Remaining 17.85 acres of land descried in Schedule 5 is in his possession whereas the defendants in their written statement have neither pleaded that they are in joint possession of the above land nor they have pleaded their possession on the agricultural land. It has been pleaded in the written statement that even though partition of the agricultural land was not done, the plaintiff sold his 1/3 share of agricultural land with their permission and considering this anomaly in the pleading of the defendants and also considering that the plaintiff has pleaded that the land in question fell in his share and he also sold the part of his holdings in the year 1972, the stand of the defendants that they permitted the plaintiff to sell 1/3 share has not been accepted. Referring to the statement of Baijnath before the Court, it has been observed that from his evidence, it appears that Jagannath never sought permission and sold the land without permission of the defendants. Referring to the document of Ex. P-49, the Court has held that

the same bears the signature of Baijnath wherein he has admitted that the land of Beladula fell in the share of Jagannath Agrawal in partition. The agricultural land is recorded in the name of the plaintiff. He had transferred some part of the land vide sale deed of Ex. P-27, P-28 and P-29 in the past though the defendants have also sold agricultural land at Beladula vide Ex. P-30 to P-34 but the above sale deed was executed after 1995 during the pendency of the suit whereas copy of Panchshala Khasra filed and proved during trial mentions Jagannath as possessor of the agricultural land and accordingly it has been held that Jagannath's title and possession over the agricultural land at Beladula is established, after going through the documents referred by the trial Court and statement of the plaintiff, Jagannath and defendant Baijnath, this Court is of the considered opinion that the finding of the trial Court in this regard is based on documentary and oral evidence available on record.

42) So far as objection of the appellant that the details of grant of licence and termination there of has neither been pleaded nor proved, however from perusal of para 9 of the plaint, it has been pleaded that in the oral partition, the house was allotted in the share of the plaintiff and his father. It has been further pleaded in para 7, 9 and 12 that the house which fell in the share of Baijnath was not fit for residential purpose and therefore, he permitted the defendant to live in the said house as licencee till he constructed his own new house. He allowed the defendant to continue in possession as they had good relationship with the defendant and he was planning to go to Bengal to do his business. Therefore, he permitted him so that he would take care of the house in his absence. In para 12, it has been pleaded that he returned from Bengal in the year 1983 and started residing in his house. By that time his sons

had grown up and therefore, he requested the defendant to vacate the house as he required the same for his own purpose however, initially he promised that he shall be vacating the house but when he refused to vacate, the instant suit was filed.

43) So far as the contention of the appellant that the suit of the plaintiff was barred by law of limitation is concerned, from the pleading of the plaintiff, it is clear that the plaintiff instituted the above suit when the defendant declined to vacate the house in the year 1983 after the plaintiff terminated the licence and asked him to vacate. Similarly the suit for declaration of his title over the agricultural land situated in Beladula was filed by the plaintiff in the year 1989 by amending his plaint as on his application for mutation, Tehsildar Raigarh directed him to get his title of the suit land declared from the civil court vide order dated 20-7-1988 and the revision preferred by him was rejected, therefore, the finding of the trial Court that the suit filed by the plaintiff was within time and the same was not barred by law of limitation is in accordance with law.

44) So far as the argument of the appellant that various objections taken at the time of recording of evidence were not decided by the trial Court with a note that the same shall be decided while delivering the judgment, however the same have not been considered, is concerned, learned counsel for the appellant could not point out that the judgment of the trial Court is based on any evidence which was recorded during trial despite the objection by the defendant, and therefore, the objection in this regard is meaningless as the same has not affected the impugned judgment to the prejudice of the defendant.

45) On the basis of the aforesaid discussion, this Court is of the considered opinion that the trial

Court has rightly decreed the suit for possession of the suit house of the plaintiff and the declaration of the title of the plaintiff over agricultural land described in Schedule 5 of the plaint and the defendants did not have any right over the same. There is no illegality or infirmity in the impugned judgment and decree.

46) In the result both the appeals preferred by the appellants are without substance and the same deserve to the dismissed and are accordingly dismissed with cost throughout.

Sd/-
Dhirendra Mishra
Judge

P/-